IN THE

Supreme Court of the United States

October Term, 1976.

No. — 76-1456

IN THE MATTER OF THE APPLICATION

OF

WILLIAM ROBERT KLEIN, a/k/a WILLIAM ROBERT KLEIN, An Attorney at Law.

WILLIAM R. KLEIN,

Petitioner,

v.

DAVID N. EDELSTEIN, Chief Judge, U. S. D. C. for the S. D. N. Y.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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In the SUPREME COURT OF THE UNITED STATES

OCTOBER 1976 Term

In The Matter of the Application of

William Robert Klein,
a/k/a William R. Klein,
An Attorney-at-law

William R. Klein — Petitioner

David Edelstein,
Chief Judge,
U.S.D. Ct., — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays for a Writ of Certiorari to review the determination of the U.S. COURT of Appeals for the Second Circuit, on appeal from two final orders of the Chief Judge of the United States District Court for the Southern District of New York, and the order of denial by Court of Appeals, of Petitioner's application for rehearing, of its judgment of affirmance, dated January 21, 1977.

The U.S. Court of Appeals' affirmance is dated October 28, 1976; The Chief Judge's order of disbarment bears date September 25, 1974; His order, denying vacature of same, and opinion, is dated February 2, 1976; and the Chief Judge's order, denying petitioner's application, for formal adversary hearing, as prescribed by District Court's General Rule 5 (d), is dated March 19, 1976.

PRELIMINARY STATEMENT

The subject Federal disbarment order of September 25, 1974, made pursuant to U.S. District Court SDNY, General Rule 5 (d), entered by its Chief Judge-respondent herein, is solely predicated, in its recitals, upon an alleged final judgment, entered in the State's Appellate Division of Supreme Court, 2nd Department, on June 29, 1965.

That Underlying judgment became the subject of certiorari in this Court to the New York Court of Appeals, October 1966 Term, No. 665 (385 US 973 et seq.), Certiorari was then denied, after Justice Harlan had denied a preliminary stay of state proceedings; holding, that they presented no substantial Federal question. That holding seemingly followed upon a sworn allegation of the state prosecutor, in opposition, that the judgment of disbarment was a mere "default" judgment, with hearings still to come; thus being without finality, or substantiality, for this Court's consideration.

However, nothing could have been further from the truth, and that damage was done,- as Petitioner was then advised by eminent counsel, practising before this Court. Especially so, also, in connection with the State's Court of Appeals' omission, in its remittitur, to certify, that, in its adverse decision of affirmance,constitutional questions had been necessarily considered, and determined adversely to this petitioner, upon his said appeal.

Since then, much more of a constitutional, due-process import has developed. That remittitur has been appropriately amended (26 NY (2) 961)(29a) to reflect, that constitutional issues had been raised, and decided, by the State's Court of Appeal, necessarily, in

connection with its adverse decision of July 7, 1966. That amended remittitur is now part of this Appendix, dated April 9,1970. (App.D,47-8)

The falsity of that "default" claim may be seen, in its actual light, now that respondent has employed that same "final" judgment, 10 years later, as sole predicate of his further disbarment order herein, of September 25, 1974. (App. C,31a)

JURISDICTION

The order of the Chief Judge of the District Court under review, which denied vacature of his earlier automatic disbarment order, dated September 25, 1974,* was entered February 2, 1976.** The Chief Judge's order denying to petitioner, the formal hearing, provided for, under General Court RULE 5 *** (d), was filed March 19, 1976.** The Court of Appeals order, denying to appellant, his petition, for hearing, on its affirmance judgment, was filed January 21, 1977.**

No order for any extension of time for petitioning this Court was made or applied for.

(The Court of Appeals made a further order for a money judgment covering printing costs of respondent, as billed, in sum of $498, against this petitioner, alleged as "necessarily incurred" in response to appeal, as unduly harsh, and under the circumstances, tending to compound the very unjust nature of the affirmance below.)

The statutory provision, for conferring jurisdiction, is 28 USC 1254 (1).

** App.B , 29-31;32-46 App.C
* App.C , 31a
*** App.A ,26

U.S. AND STATE CONSTITUTIONAL PROVISIONS, AND STATE STATUTES INVOLVED. (App.A,25-8)

U.S. Const., 14th Amendment (as to due process) and equal application of the laws).

U.S. Const., 6th Amendment . (affecting right to be informed of charges, confrontation et al. as part of fair trial procedures).

New York State Const., Art. 1, Secs. 9, 11, Art 6, Sec.20.

New York State statutes: Section 90 (6) of the Judiciary Law; Section 5011, Civil Practise Law and Rules, governing definition of a final judgment; Sections 3211-3211 f, CPLR, and Section 404 CPLR, (right to make motion to dismiss Complaint or Petition, with automatic leave to answer upon denial thereof. (App.A, 27-8)

QUESTIONS PRESENTED

1. Whether the Chief Judge, vested with authority over discipline of the members of the District Court's Bar under the General Court Rule 5(d) could avoid the 4 prescriptive"principles" of the Rule, admittedly "codified"(p.10 resp.brief) and built in, for the attorneys' constitutional protections,BEFORE disciplining any member, on State Court's Judgment, (See this Court's own, more modest, Rule 8).

2. Whether the facial deficiencies, in due-process recitals, of the predicate state court judgment, (some 10 years old), should not have restrained the Chief Judge, and instead to issue a show-cause order, why discipline should not be imposed, as the Rule requires.

3. Whether the Chief Judge's secret, off-Bench, 16-month "investigation", holding himself incommunicado to the Petitioner in the interim, after first ordering his automatic disbarment, was

not a gross unconstitutional departure from due-process and a judicial abdication by the Chief Judge, precluding his return to any decision-making, thereafter.

4. Whether the state court judgment of disbarment of June 29 , 1965 had not, by subsequent dismissals in the State courts, of most of the underlying charges, and of their findings of guilt, (1966-67) been rendered obsolete, so as to bar its use as a predicate for automatic discipline in the Federal Court.

REASONS FOR GRANTING WRIT

1. The record discloses an exercise in judicial tyranny, by the empowered Chief Judge, under said General Court Rule 5 (d), an effectual judicial prosecution, of this petitioner, openly flouting each of the four constitutional protections for federal attorneys, themselves being specific outgrowth of a series of standardizing Opinions, rendered by this Court, for the Chief Judge's guidance in all District Courts of the United States. The callous or indifferent conduct in this case of the Chief Judge, poses a powerful threat to the independence of the Federal Bar, we submit.

2. The Orders on review, and the opinions of the Chief Judge, affirmed without Opinion, come in total disregard of this Court's long line of due-process Opinions, affecting an attorney's sacred professional status; and in direct conflict with two, more recent, Opinions of this Court, dealing, directly, with the specific subject of the power of a Court in mitigation, to subsequently reconstruct, shore up to cure a judgment, which is admittedly subject to constitutional infirmities, a product of denial of basic constitutional guaranties, - as definitely herein so admitted, by the Chief Judge's Opinion, and in his

counsel's Brief.

3. A glaring, diametric conflict in court treatment, stands exposed of the same predicate judgment of the state court, by two U.S.District Courts, (by the Eastern and Southern Districts of New York), and also between the respective Chief Judges thereof. The Eastern District Chief Judge, under same Rule, issued show-cause order at once and thereupon ordered full investigation of this petitioner's claims, by the local U.S. Attorney, and that he report back his findings and recommendations on the facts and the law to the Chief Judge (EDNY, Index No. 65 M 811 (1965). This respondent Chief Judge, instead, declined to issue any show-cause order, went off-bench on his own 16-month investigation, totally disregarding the same Court Rule 5d. The Southern District Chief then also disregarded the prior Chief's Report of 1968, filed in the Eastern District; which had found as constitutionally invalid, that same judgment of the State Court, and on which he held no federal prosecution could be founded, or cure thereof effected, except, first, by its vacature.

4. The unprecedented intromission of a surprise voluminous record for appeal, not part of the original District Court record, does violence to the entire appellate process and should be condemned by this Court.

5. A whole series of wasteful recurrent proceedings (1965-77) have occupied the Courts, each apparently backing up the original error of disbarment, without essential prior notice, and without hearings, in advance and, "BEFORE" discipline is imposed or guilt is found; ignoring in succession, first, the state disciplinary statute, Sec.90 (6) of Judiciary Law; SECOND, the state statute, Sec. 5011, of the Civil Practise Law and Rules, defining a due-process judgment; THIRDLY, ignoring a whole line of constitutional rulings by

this Court, built into the present, governing General Court Rule 5(d) and culminating in its recent opinion (Fuentes vs Shevin) 407 US 67 (1972).
This Court can put a halt to all this, now that all parties are, for the first time in consensus, that the judgment of the State court of June 29, 1965, was a constitutional nullity on that day, disagreement remaining only as to subsequent curability.

(Petitioner intends soon to move this Court for leave to file, and for rehearing nunc pro tunc, in Re Klein vs Klein, (385 US 973) based upon the substantial new developments, since the denial here of writ (1966-67); which in petitioner's advised opinion, should enable petitioner to present a much strengthened Petition). Perhaps, a consolidation of these two proceedings were in order under this Court's Rules. A detailed background and which this respondent Chief Judge professed to have "examined", only privately, would be thus available for this Court's full unified examination.

STATEMENT OF FACTS

(There are two sets of facts; one, of this immediate matter on review, and two, those of the underlying state-court judgment proceedings. In neither case has petitioner's statements thereof herein been disputed by his opposition.)

Petitioner, a member of the Bar of the U.S.District Court, Southern District of New York and also of the Eastern District of New York, and also of the District of Columbia, on or about October 8, 1974, was served with an instant final order of disbarment, entered in the Southern District, on September 25, 1974 by the Chief

Judge, Hon.David N. Edelstein,respondent.

Said order recited as its sole predicate, an order of disbarment, entered in the State's Appellate Division of Supreme Court, Second Department on June 29, 1965 (Appellees Addendum, AA 345, hereinafter referred to as "AA"). How the Chief Judge came into possession of a copy of said 1965 judgment is actually unexplained (49a). On its face, it lacks required due-process recitals, as prescribed by State statute, defining a final judgment (Sec.5011, Civil Practise Law and Procedure). In addition, by similar Chief Judge's proceeding, under same General Court Rule 5 (d) in the Eastern District, it had been tested, and such prosecution dismissed (1965-1968, 65 M 811), as will later herein appear.

For, correspondingly, said judgment of 1965 never was preceded by essential notice of charge, nor of any hearing had on any charge; and no opportunity, as provided by state laws for service of answer, after submission of usual motion to dismiss the petition, was afforded by the disciplining state's Appellate Division (385 US 973, Klein vs Klein, writ of cert. den. Oct. 1966 Term).

Immediate demand by Petitioner for vacature of the September 25, 1974 order (Edelstein, C.J.), and for his issuance of an order to show cause pursuant to Rule requirement, as had issued in the Eastern District in 1965, (Appellant's Appendix 2a, 8a), was made, accompanied by sworn, relevant data, (3a,5a and 10a,49a).

The respondent Chief Judge, instead, holding himself incommunicado to this Petitioner, for a sixteen-month period, was"investigating" (55a) and "examining" (p.10,Appellee's Brief Footnote), making no disclosure at all thereof, neither informing, nor confronting

the petitioner, nor disclosing the subject matter, giving no opportunity to explain, or defend, if necessary. That silence was broken and with an "invitation" to attend, with the Chief Judge (27a) after a series of letters to him, asking urgently for formal hearing under the controlling Rule, with a climactic letter of December 1st, 1975. (59a) (See also letters of inquiry before and aft (59 a) from petitioner, from October 2, 1974 to December 1, 1975 in Appendix on Appeal.

At the invitation session held on January 16, 1976, the Chief Judge continued to keep respondent in the dark (10a to 19a incl). On February 2, 1976, he surprised (42a) Petitioner with a final Order and Opinion (20a), denying vacature of his automatic order of September 25, 1974.

Whereupon, petitioner made application, demanding the Rule 5d adversary hearing at the January 16, 1976 session (AA 30, 40a); and by Memorandum dated March 19, 1976, the Judge surprisingly treated that motion as a mere "untimely" motion for "reargument" (41a,47a), and with denial.

The requirement for such formal sworn hearings was self-propelled and heightened by the two Opinions' creation of issues of fact, real or unreal.

Some of the issues of fact, relevant in the state record to the four protective provisions of the Rule, may here be listed:

a. the retaliatory nature of the state prosecution, including basic allegations of bias and prejudice in the disciplining state court (123,128, 137,293,315, 309-417 AA); never disputed by the prosecution (1963-69)

b. the origins of the prosecution, and the lack of jurisdiction of the proceedings from outset; (103,288,144,222 AA) (93, 106 AA); never disputed.

c. The complete omission, by the Opinions, of any reference, to the Appellant's Brief in the N.Y.Court of Appeals, with its undisputed analysis, in complete exoneration of the appellant, on each and every charge, standing later dismissed or undismissed (364 AA; 74 AA, 129-30 AA; 288 AA, 222, 232, 132 AA).

Petitioner appealed duly (#76-6072); and the Chief Judge, as entitled adversary on appeal, retained as counsel, the U.S.Attorney for Southern District of New York (see Brief p. 2). The record on appeal,necessarily thin, had been agreed upon with Chief Judge's Chambers; and so certified by the District Court Clerk (see Docket Sheet A). Unbeknownst, however, to appellant, authorization was obtained by counsel, for use of a voluminous 418-page,"Appellees Addendum"; and only at p. 10 of counsel's Brief, does it appear vouched for, that its contents are "the record of the State proceedings as examined by the District Court". Apart from non-knowledge,with his late arrival, after the event, the fact is that "records" show substantial omissions, as already pointed out; and the Opinions of the Chief Judge also omit much that would bar his conclusions, and also some of his selective inclusions.

Though Counsel must have felt some belated need to print in terms of the Chief Judge's secret 16-month"investigation", off-Bench, there is not a single instance

where use of that 418 pages was made to show any false factual presentation by petitioner in any part of the record, submitted by petitioner anywhere in any court prior to his entry. (To add to the harshness of the situation, the Court of Appeals, allowed, on counsel's application, costs, of $498, for that printing, although not any "necessarily incurred" (order dated February 28, 1977) by respondent, and as no part of the record, agreed upon with Judge's Chambers, before counsel's entry on the appeal scene.

POINT I

THE AFFIRMED OPINION OF THE DISTRICT COURT, IN AUTOMATIC ACCEPTANCE OF THE STATE COURT JUDGMENT OF DISBARMENT, AS SOLE PREDICATE FOR FEDERAL DISBARMENT, VIOLATES THE CONSTITUTIONAL "BEFORE" PREREQUISITES, AS EMBODIED IN

(a) the 14th Amendment of the U.S. Constitution (due-process and equal application clauses);
(b) the controlling General Court Rule 5 (d); its protective provisions being themselves, "codified", and rooted in opinions of this Court (Selling v. Radford, 243 US 46, and Re Theard v. US, 354 US 278),
(c) the state's controlling, literal "BEFORE" statute, on attorney's discipline, (Section 90 (6) Judiciary Law; and the State's statute, of definition of a valid final judgment (section 5011, Civil Practise Law and Rules) (App.A,28)

The state judgment, on its face, lacks essential due-process recitals, corresponding to the fact, that, at no time "BEFORE' entry, was there an essential notice of charge, or any hearings had on any charge, against respondent.

It has been held that such a judgment may not command the respect of any Court (Mooney v. Holahan, 294 US 103; Ferguson vs, Crawford, 70 NY 253). Mr. Justice Frankfurter, in 330 U.S., at p. 309 wrote:

> "Only when a Court is so obviously travelling outside its orbit, as to be merely usurping judicial forms, and facilities may an order issued by a court, be disobeyed and treated as though it were a letter to a newspaper."

This Court has also held, that such a judgment may be enjoined from further use, or circulation. (Simon v. Southern Railway, 236 US 110) (Unprecedented in N.Y. Legal History since 1735).

POINT 1a

FOR THE FIRST TIME CONSTITUTIONAL "INFIRMITIES" IN SAID STATE COURT JUDGMENT NOW STAND CONCEDED (P. 11, Ans. Brief; 23a and 24 a); AND THAT TWO FUNDAMENTAL CONSTITUTIONAL "GUARANTIES" OF NOTICE, AND OPPORTUNITY TO BE HEARD "BEFORE" ANY FINDING OF GUILT, OR IMPOSITION OF DISCIPLINE, WERE IN 1965, DENIED BY THE STATE COURT'S FINAL JUDGMENT OF DISBARMENT TO THIS PETITIONER.

It is that judgment of disbarment which, alone, concededly, produced the Chief Judge's auto-

matic order of Federal disbarment, under review.

His Opinion of February 2, 1976, as affirmed, essentially reads (20a):(App.C ,32)

> "The issue presented to this Court by Mr. Klein's motion is a narrow one: Whether an examination of the record of the state proceeding discloses that the procedure 'was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process' Such a disclosure would preclude this Court from following the state determination".

The Opinion at first, adopts petitioner's own view (19 a) that

> "the issue herein is a narrow one",

looking, of course, to the "BEFORE" requirements as set out,at outset of POINT I. It then proceeds, however, to range far and wide in self-abrogation,(calling "guaranties" a mere "form",) (24a)(29a),

> "The Court has examined the <u>entire record</u> of the state court proceedings"...

i.e., subsequent to the entry of judgment, and then concludes:

> "It would be a gross elevation of form over substance to conclude at this juncture that a state proceeding was so lacking in notice and opportunity to be heard, as to require that this Court not give effect to the order of disbarment."

But with the following expression of its qualms:

> "In deciding to give effect to the State court proceedings, this Court is not endorsing the procedure employed by the state courts. All this Court decides today, is that the state proceedings were not so offensive to due process as to require this court to treat the state disbarment as a nullity."

Then the Opinion opens the door wide to defeat the specific "BEFORE" prerequisites of the state statute (Jud. Law, 90 (6), Rule and constitution (24a), as follows:

> "The question presented is whether subsequent proceedings in the state court in any way mitigated or repaired the defects in the original order.

And the Chief Judge then finds in the affirmative, thus permitting a later shoring up, a repair of such state judgment.

The Chief Judge's Report (by U.S.Attorney EDNY) on file in the Eastern District Court, dated September 9, 1968, was followed by petitioner's reinstatement to full membership in that Court, and precluded any mitigation, or subsequent repair of that judgment, as void ab initio for want of constitutional validity; or, as a basis for federal prosecution thereon. Both Courts now agree upon the basic constitutional infirmities," to which the disbarment judgment of the state court is subject (p. 11, Resp.Brief).

POINT 1 (b)

THIS COURT HAS RECENTLY RULED THAT A JUDGMENT, LACKING IN INITIAL CONSTITUTIONAL VALIDITY, IS INCURABLE BY SUBSEQUENT PROCEDURES. ONLY A MOTION TO VACATE IS IN ORDER.

In Fuentes v. Shevin, 407 US 67 (1972), which gives the history of due process, and the earlier, Armstrong v. Amanzo, 380 US 545, (1967) it would appear that all concepts of possible post-judgment repair, cure or mitigation, where federal guaranties have been initially ignored, violated, postponed in operation or in protection, are ruled out; and that such basic denial is to be avoided, whether in respect to the menial commercial item of a washing machine, or a man's liberty, physical or professional. The whole concept of protection of the 14th and 5th Amendments "BEFORE", not after the transaction in issue, has been left in no doubt any longer:

At p. 80 (Fuentes):

"For more than a century, the central meaning of due process has been clear; Parties whose rights are to be affected are entitled to be heard, and in order that they enjoy that right, they must be notified (citing cases). It is equally fundamental that the right to notice and an opportunity to be heard MUST BE GRANTED AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER. Armstrong v. Manzo, 380 US 545,52.

(In the instant case, after petition to discipline was served in December 1964, and the respondent promptly served his motion to

dismiss, claiming (a) lack of jurisdiction, (b) legal insufficiency of the petition, amongst some 11 claims in bar, and including, admittedly, "a number of defenses (p.5 Respondent's Brief) the statutory right of this petitioner to serve and file Answer to the charges, within 10 days after notice of entry of the Appellate Division's order denying same, dated June 29, 1965, should have followed in due process. That was by state's statutes: Sec. 3211 f, CPLR, and Sec. 404-9, CPLR; instead, final judgment was entered, abruptly cutting off this petitioner's right to answer on the merits (56-60 AA). And in accordance with this Court's specific rule, laid down in the Armstrong case post, this petitioner at once moved to vacate that sudden judgment, which motion was denied.

Fuentes opinion proceeds:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making, when it acts to deprive a person of his possessions. The purpose of the requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitra encroachment,--to minimize substantively unfair or mistaken deprivations of property...So viewed, the prohibition against the deprivation of property without due process of law REFLECTS THE HIGH VALUES EMBEDDED IN OUR CONSTITUTIONAL AND POLITICAL HISTORY, THAT WE PLACE ON A PERSON'S RIGHT TO ENJOY WHAT IS HIS, FREE OF GOVERNMENTAL INTERFERENCE. (citing cases) (emphasis mine)
>
> "If the right to notice and a hearing is

to serve its full purpose, then it is clear that it must be granted AT A TIME WHEN THE DEPRIVATION CAN STILL BE PREVENTED. At a later hearing, an individual's possessions can be returned to him, if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him, for the wrongul deprivation. BUT NO LATER HEARING AND NO DAMAGES AWARD CAN UNDO the fact that the arbitrary taking that was subject to the right of procedural due process HAS ALREADY OCCURRED. "This Court HAS NOT EMBRACED THE GENERAL PROPOSITION THAT A WRONG MAY BE DONE, IF IT CAN BE UNDONE. (Stanley v. Illinois, 405 US 645,7) ... OPPORTUNITY FOR THAT HEARING MUST BE PROVIDED BEFORE THAT DEPRIVATION TAKES PLACE, (citing cases),(citing the disciplinary case of RE Ruffalo, 390 US 544)(emphasis added)

at p. 85.
"It is now well settled that a temporary, non-final deprivation is NONETHELESS a "deprivation" in the terms of the 14th Amendment. (Sniadack v. Family Finance Corp. 395 US 337.) (Referring to the Ruffalo case ante, pertinently, Justice Douglas therein emphasized:

> "As noted, the charge (no. 13) for which he stands disbarred was not in the original charges made against him."

Excerpts from the Armstrong v. Manzo Opinion of the U.S. Supreme Court, follow: (380 US 545):

> "We granted certiorari (379 US 816). The questions before us, whether failure to notify the petitioner of the pendency of the adoption proceedings, deprived him of due process of law, so as to render the adoption decree constitutionally invalid; and if so, WHETHER THE SUB-

SEQUENT HEARING ON THE PETITIONER'S MOTION TO SET ASIDE THE DECREE served to cure its constitutional invalidity.

(This is precisely the motion made by petitioner in the Appellate Division, promptly upon entry of the decree of disbarment, on surprise discovery thereof (22a).)

> "... There can be no question that, at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Tr. Co. 339 US 306,13)
>
> "An elementary and fundamental requirement of due process in any proceeding WHICH IS TO BE ACCORDED FINALITY is notice reasonably to apprise ... and afford opportunity to present their objections (Milliken v. Meyer 311 US 457, et al.)

(Herein, objections were first filed,"in bar" (21a) some 11 in number, which, with their denial and dismissal, on June 29, 1965, should have been followed by opportunity to answer by way of denials and affirmative defenses, if any)

. . . . . .

"The State of Texas Civil Court of Appeals held with Texas precedents that whatever constitutional infirmities, resulted from the failure to give the petitioner notice HAD BEEN CURED By the hearing subsequently afforded to him UPON HIS MOTION TO SET ASIDE THE DECREE. 371 SW (2) 412. WE CANNOT AGREE.

. . . . . .

"It is plain that WHERE THE BURDEN OF PROOF LIES MAY BE the DECISION OF THE OUTCOME. Speiser v. Randall 357 US 513,25. Yet these burdens would not have been imposed upon him, had he been put in timely notice in accordance

with the Constitution."

And at p. 552, Armstrong case:

> "A fundamental requirement of due process is the ' opportunity to be heard! Granus v. Ordeau, 234 US 385,94. IT IS AN OPPORTUNITY WHICH MUST BE GRANTED AT A MEANINGFUL TIME AND IN A MEANINGFUL MANNER. The trial court could have fully accorded this right to the petitioner ONLY BY GRANTING HIS MOTION TO SET ASIDE THE DECREE, AND CONSIDER THIS CASE ANEW. ONLY THAT WOULD HAVE WIPED THE SLATE CLEAN. ONLY THAT WOULD HAVE RESTORED THE PETITIONER TO THE POSITION HE WOULD HAVE OCCUPIED, HAD DUE PROCESS BEEN ACCORDED HIM IN THE FIRST PLACE. HIS MOTION SHOULD HAVE BEEN GRANTED.

In Desmond v. Rachey, 315 F. Supp. 328 at p. 332:

> "Due process normally requires a hearing and opportunity to present a defense BEFORE incarceration, and the fact that there is a SUBSEQUENT procedure by which the debtor may obtain his release DOES NOT CHANGE THE RESULT."

Petitioner submits that, what the United States Supreme Court said in the case of Berger v. U.S. 255 US 22, concerning the incurable prejudice suffered by one, who is denied due process (in that case, a biassed court that should have ceased to further function) is here most a propos: (Bias is element herein also.)

> "To commit to a Judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. The remedy by appeal is inadequate. It comes after the trial, and if prejudice exists it has worked its evil and a judgment of it in a reviewing tribunal is PRECARIOUS.

It goes there FORTIFIED BY PRESUMPTIONS.."

POINT II

THE STATE COURT JUDGMENT OF JUNE 29, 1965, HAVING BECOME OBSOLETE WITH SUBSEQUENT DISMISSALS OF MOST OF THE CHARGES, DURING 1966 and 1967, AND THUS VACATABLE FOR REASSESSMENT OF PUNISHMENT, THE CHIEF JUDGE NONETHELESS ACCEPTED IT.

THE AFFIRMED OPINION DISREGARDED THE MANDATING RULE OF THIS COURT, REQUIRING INSTANT REVERSAL AND VACATURE OF SAID JUDGMENT WHERE RENDERED AS A SINGLE COLLECTIVE PENALTY, COVERING A GROUP OF GUILT FINDINGS, UPON SHOWING OF THEIR SUBSEQUENT ELIMINATION,AS MATTER OF DUE PROCESS; WHICH RULE WAS ADOPTED BY STATE'S HIGHEST COURT, BUT WITHOUT BENEFIT THEREOF APPLIED TO THIS PETITIONER, and THUS WITHOUT EQUAL BENEFIT OF THE LAWS TO THIS PETITIONER.

It stands conceded by the Chief Judge's Opinion, that, of an original eight charges and findings of guilt thereon, most were dismissed later, without any defenses offered by this petitioner, in the state courts (29 a). Thus, also Rule 5 d, (2) (3) (4) subdivisions would come into play in due process.

This Court, in Gompers v. Buck Stove, 221 US 408,440 held, that, where a collective single penalty is imposed for a collection of offenses, upon the dismissal of any one or more thereof, judgment must be vacated in favor of a process of judicial reassesment of the penalty, as matter of due process.

This rule was followed by the New York Court of Appeals in Re Del Bello, 19 NY (2) 166, and

Re Sarisohn, 1967, ___NY_____, wherein one of eight findings of guilt were reversed and judgment was vacated to allow reassessment of punishment for the remaining collective group,

POINT III

THE 16-MONTH OFF-BENCH INVESTIGATION BY THE CHIEF JUDGE, WAS A GROSS DEPARTURE FROM THE PRESCRIBED PROCEDURES OF RULE 5 d, HIGHLY PREJUDICIAL, TANTAMOUNT TO ABDICATION OF JUDICIAL OFFICE, AND SHOULD HAVE PRECLUDED HIM FROM MAKING DECISION, AT ALL.

Actually, Justice Frankfurther's Opinion, set out under POINT I is, literally, a propos, HERE.

Judicial condemnation of a Judge's assumption of an investigative role has been recorded in opinions of this Court, and of the state's highest Court. The state's Constitution specifically bars a Judge from becoming investigator, as e.g., a referee to report etc. (Art 6, sec 20 N.Y.St.Const.) This downgrading of the Judge function received the attention of Mr. Justice Black in Cohen v. Hurley, 306 US 107, 139, as intolerable practise; also in Re Anon. 6 & 7 v. Baker, 360 US 287; The New York Court of Appeals, in Re Richardson/Connolly vs. Scudder (247 NY 401)

This Court is reported in the New York Times, March 23, as to a set of "seven Florida cases " affecting sentence on March 22, 1977, to have ruled that a trial Judge may not decide sentence of criminal defendants on the basis of confidential investigation reports, not made known to defendants' counsel; holding pertinently as reported,

"The defendant must have access to what ever information the judge is considering in order to have a chance to explain or deny it, the Court said."

This Court, in Re Willner, 373 US 596, declared:

> "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood (see Green v. McElroy, 360 US 474, 96-7)
>
> "But a full hearing, a fair and open hearing, requires more than that. Those who are brought in contact with ... government in a quasi-judicial proceeding, aimed at the control of their activities are entitled to be fairly advised of what the Court proposes, and to be heard, upon its proposals BEFORE IT ISSUES ITS FINAL COMMAND. (Morgan v. US 304 US 1, 18,19)

HEREIN, this Chief Judge denied openly that he was"engaged in an adversary proceeding", misapprehending his function under the governing Rule, of his authority and power. (29 AA), suggesting a judicial prosecution, as evidenced in the state court also.

The "invitation" session of January 16,1976 was so far non-judicial in petitioner's view, he then asked the Judge for the formal hearing prescribed by the General Court Rule 5 d (a) (b) (c) (d). (33 to 41 AA)

The Chief Judge's investigative tour was followed by his expressions of confidence in the State Judges' acts; such presumptions being inordinate for Judges who were not initially deterred by constitutional imperatives (24a, 30a, 31a).

The afterthought importation by counsel for respondent, for appeal purposes, of 418 pages as "Appellee's Addendum" was most strange. His Brief's footnote at p. 10, vouching for them "as examined by the District Court", only

aggravated the anomalous practise. But his text assurance, that "Pursuant to the Rule 5 (d) the Chief Judge examined the entire record of the Appellate Division's proceedings, does violence not only to this court's long line of "due process" "fair trial" opinions, but to the prescriptions of Rule 5 d. And it is further inordinate, as has been already pointed out, the Chief Judge's Opinion of February 2nd, and March 19th, 1976, avoid crucial portions of that "entire record", which would preclude the respondent's positions and assumptions.

Of course, the author of the Respondent's Brief, arriving only for the appeal, was in no position to assure the Court of the reality of either statement. However, the offense, seemingly unprecedented, to appellate procedure and principles, was compounded by surcharging to this petitioner, a bill of costs therefor, though those "records" were no necessary part of, or "necessarily incurred" in the response to this appeal below. For, at no point was that record used to demonstrate that the appellant had mis-stated any part of the record, and on the other hand, petitioner has shown that a substantial part of the record was self-servingly withheld. The Court of Appeals Order billing those costs is part of this Appendix, to show a compounded state of the injustice below.

CONCLUSION

THE PETITIONER'S WRIT OF CERTIORARI SHOULD BE GRANTED IN THE INTEREST OF JUSTICE, BECAUSE OF UNIQUE ISSUES, RAISED BY THE RECORD, ON MATTERS OF BROAD FEDERAL COURT CONCERN, AND AFFECTING ONE'S PROFESSION.

WHEREFORE, this Petitioner prays for said relief to be granted by this Court.

Dated New York, April 15, 1977

WILLIAM ROBERT KLEIN
Petitioner pro se
118-21 Queens Blvd.
Forest Hills, N.Y.
11375

VERIFICATION

County of Queens, State of New York: SS::

William Robert Klein, being duly sworn, deposes and says:

I am the above named petitioner. I have read the contents of the within Petition, and the same is in all respects true and correct, to the best of my knowledge and belief, except as to any matters therein alleged to be upon information and belief, and as to those matters, I believe it to be true.

William Robert Klein /s/

Sworn to before me
this 15 day of April
1977

Notary Public
State of New York
No.
Qualified in Queens County
Commission expires March 30,197-

SARA J. ROSENBERG
Notary Public, State of New York
No. 41-9651838 - Queens Co.
Term Expires March 30, 1978

APPENDIX A **

U.S. Constitution

1st Amendment: "Congress shall make no law abridging the freedom of speech, --- the right of the people *** to petition the government for a redress of grievances."

14th Amendment: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

6th Amendment: "*** in all criminal prosecutions the accused shall enjoy the right *** to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him ***".

United States Statute: 28 USC 1254 (1)

** There are three separate Appendices referred to herein:

The annexed --("APP.A,B,C,D.")
Joint Appendix(USCA-2) "1 a, 2 a.."
Appellee's Addendum: "AA "

Appendix A

Rule 5. General Rules for the United States District Court for the Southern District of New York.

Discipline of Attorneys

• • •

(d) Any member of the bar of this court who shall be disciplined by a court in any State, Territory, other District, Commonwealth or Possession, shall be disciplined to the same extent by this court unless an examination of the record resulting in such discipline discloses (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion on that subject; or (3) that the imposition of the same discipline by this court would result in grave injustice; or (4) that the misconduct established has been held by this court to warrant substantially different discipline.

Upon the presentation to the court of a certified or exemplified copy of the order imposing such discipline, the respondent attorney so disciplined shall, by order of the court, be disciplined to the same extent by this court, provided, however, that within 30 days of the service upon the respondent attorney of the order of this court disciplining him, either the respondent attorney or a bar association designated by the chief judge in the order imposing discipline may apply to the chief judge for an order to show cause why the discipline imposed in this court should not be modified on the basis of one or more of the grounds set forth in this Paragraph (d).

• • •

APPENDIX A

New York State Constitution:

Art. 1, Sec. 9: "No law shall be passed abridging the right of the people *** to petition the government or any department thereof."

Art. 1 Sec. 11: " No person shall be denied the equal protection of the laws of this State or any subdivision thereof."

Art. 6 Sec 20:"A judge ... may not *** (4) act as referee... which interferes with the performance of his judicial duties."

New York State Statutes:

Sec. 90, Judiciary Law: "Subd. 6. Before any attorney... is suspended or removed, *** a copy of the charges against him must be delivered to him personally *** and he must be allowed an opportunity of being heard in his defense."

Rule 3211, Civil Practise Law and Rules:
(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him, on the ground that: (Citing some 10 grounds for dismissal).

(f) "Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action... sought

APPENDIX A

to be dismissed, extends the time to serve pleading until 10 days after service of notice of entry of the order."

Sec. 404 of same CPLR: (a) By respondent. The Respondent may raise objection in point of law*** by a motion to dismiss the petition ... If the motion is denied, the court may permit the respondent to answer... such answer shall be served within 5 days after service with notice of entry."

Section 5011, same CPLR:"Definition and content of judgment: A judgment is the determination of the rights of the parties in an action, or special proceeding and may be either interlocutory or final. A judgment shall refer to and state the result of the verdict or decision, or recite the default upon which it is based."

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of January , one thousand nine hundred and seventy-seven.

IN THE MATTER OF
WILLIAM ROBERT KLEIN a/k/a
WILLIAM R. KLEIN
An Attorney

USCA
Filed
Jan.21,1977

WILLIAM ROBERT KLEIN
Appellant

v.

DAVID N. EDELSTEIN, Chief Judge,
U.S.D.C., S.D.N.Y.,
Appellee

---x

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by appellant, Pro Se, and no active judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

United States Court of Appeals
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of October one thousand nine hundred and seventy-six.

Present:
HON. HENRY J. FRIENDLY
HON. PAUL R. HAYS
HON. WILLIAM HUGHES MULLIGAN

Circuit Judges,

In the Matter of William Robert Klein
a/k/a WILLIAM R. KLEIN,

An Attorney, 76-6072

WILLIAM ROBERT KLEIN,

Appellant,

DAVID N. EDELSTEIN, Chief Judge,
U.S.D.C.,S.D.N.Y.,

Respondent

DOCKETED AS A JUDGMENT #77,342
ON MARCH 7, 1977

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinions of Chief Judge Edelstein dated February 2, 1976 and March 19, 1976.

Henry J. Friendly
Paul R. Hays
William H. Mulligan

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of February, one thousand nine hundred and seventy-seven.

In the Matter of
William Robert Klein, a/k/a
William R. Klein,
An attorney

William Robert Klein,
Appellant,
v.
David N. Edelstein, Chief Judge,
United States District Court for the Southern District of New York,
Appellee.

It is hereby ordered that the motion made herein by counsel for the

appellant

by notice of motion dated January 17, 1977 for leave to reconsider en banc order denying motion to disallow costs be and it hereby is denied.

Henry J. Friendly

William H. Mulligan
Circuit Judges

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

WILLIAM ROBERT KLEIN
a/k/a
WILLIAM R. KLEIN

---------An Attorney--

USDC
Sep 25 1974
S.D.N.Y.

M-2-238

Upon the annexed certified copy of order of the Supreme Court of the State of New York Appellate Division, Second Judicial Department dated June 29, 1965, and pursuant to local General Rule 5 (d) of this Court, it is

ORDERED: that the Clerk of the United States District Court for the Southern District of New York, strike the name of WILLIAM ROBERT KLEIN, a/k/a/ WILLIAM R. KLEIN, from the roll of attorneys and counselors at law admitted to practise before the United States District Court for the Southern District of New York.

Dated: New York, N.Y.

September 25, 1974

David N. Edelstein

Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

In the Matter of

M-2-238
OPINION

WILLIAM ROBERT KLEIN
a/k/a WILLIAM R. KLEIN, an attorney

X

EDELSTEIN, Chief Judge:

Pursuant to Rule 5 (d) of the General Rules of this court, 1/ William Robert Klein was disbarred from the Bar of the United States District Court for the Southern District of New York upon the presentation of a copy of a state disbarment order issued by the New York Supreme Court, Appellate Division, Second Judicial Department. Mr. Klein thereafter moved this court for an order vacating its prior order of disbarment. This opinion is occasioned by that motion.

The issue presented to the court by Mr. Klein's motion is a narrow one: whether an examination of the record of the state proceeding discloses that the procedure "was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process." 2/ Such a disclosure would preclude this court from following the state determination. 3/ The court has examined the entire record of the state court proceedings and has considered the arguments presented by Mr. Klein in his papers and in open court. 4/ Mr. Klein's motion is denied.

The state disciplinary proceedings against Mr. Klein were commenced on December 16, 1964, by petition and order to show cause. The petition alleged that Mr. Klein was guilty of seven specific acts of misconduct. 5/ Mr. Klein responded by papers "answering ... and in bar" of the proceeding which raised various legal arguments but which

did not deny any of the acts of misconduct alleged in the petition.

On June 29, 1965, an order and opinion of the Appellate Division were issued disbarring Mr. Klein from the New York Bar. 6/ The opinion recites the history of the proceedings to date, that Mr. Klein's papers failed to deny any of the charges raised in the petition, and that his legal objections are without merit. The opinion then concludes:

> When an attorney makes baseless written charges against members of the Judiciary and members of the Bar; is guilty of (acts of misconduct listed in the petition), he demonstrates such lack of character and fitness as to require his disbarment.7/

It should be noted that the first basis of the court's conclusion that Mr. Klein should be disbarred-making baseless written charges against members of the judiciary and of the bar - was not included in the petition giving notice to Mr. Klein of the charges whichwere being brought against him.

The order of disbarment itself, of the same date, recites the history of the case and then, before actually ordering disbarment, states:

> Now on reading and filing the petition verified the 16th day of December, 1964, affidavits ... and the answer of respondent and affidavit ... and all the papers filed herein... and upon the per curiam opinion of this court, dated June 29, 1965 heretofore filed and made a part hereof, and due deliberation

having been had thereon:

It is Ordered 8/

Mr. Klein moved to vacate the order in the Appellate Division stating, inter alia, that he had never received notice of the charge of making baseless written charges. 9/ His motion was granted to the extent of permitting him to serve an amended answer and referring the matter to a referee for the conducting of hearings and the rendering of a written report. 10/ The order of disbarment was never vacated.

Mr. Klein also appealed the original disbarment order and decision to the New York Court of Appeals. That court affirmed the Appellate Division's decree, stating that Mr. Klein had received an opportunity to be heard but had not raised any triable issues. 11/ The granting in part by the Appellate Division of Mr. Klein's motion, wrote the court, "assured (him) of an additional opportunity to be heard." 12/ Regarding the question of notice, the court stated that the order of disbarment:

> as its recitals demonstrate, was predicated soley on the charges contained in the petition and ... we have disregarded the intimations in the Appellate Division's opinion that the appellant made "baseless written charges against members of the judiciary and members of the Bar" in view of the fact that the petition does not contain such a charge. 13/

This court notes that the disbarment order, the relevant portions of which have been set forth above, does not indicate that only the charges specified in the petition serve as the basis of the order and does state that the order is based

upon and incorporates the opinion of the court.

The United States Supreme Court denied certiorari. 14/

Hearings were conducted before a referee pursuant to the Appellate Division's decision. After unsuccessfully moving for the disqualification of the referee Mr. Klein absented himself from the hearings even after being advised by the referee that the hearings would be continued in Mr. Klein's absence. 15/ The referee heard evidence presented ex parte and determined that three and one- half of the seven charges in the petition were supported by the evidence. 16/ His report was confirmed by the Appellate Division in an opinion which also denied Mr. Klein's renewed motion to vacate the order of disbarment.

Mr. Klein now contends that the state court order upon which this court's order was predicated is constitutionally defective since (1) it was entered without notice of all of the charges upon which it was based and (2) it was entered without any opportunity to be heard. 17/

Mr. Klein's two grounds can be considered together. His assertion that the original state order apparently was based upon a charge of conduct not included in the petition is correct. He was denied therefore the specific notice which he was guaranteed by federal law. 18/ Moreover, to the extent that without notice of one charge he was unable to respond to that charge in any manner in which he chose, he was denied an opportunity to be heard at least as to that charge.19/ The right also was federally guaranteed. 20/

The question presented to this court is whether subsequent proceedings in the state courts in any way mitigated or repaired the defects in the original order. Mr. Klein argues that even though the Appellate Division allowed him to serve an amended answer and ordered that hearings be conducted that the underlying order itself was never vacated, that that original

order is the predicate of the federal disbarment, and that if the original order is defective the federal order must be vacated.

The court cannot accept Mr. Klein's position. The court does not believe that the Appellate Division's decision to allow an amended answer and to refer the matter for hearings was an empty act and not a good faith attempt to provide Mr. Klein with a full opportunity to meet the then clearly-defined charges against him. It would be a gross elevation of form over substance 21/ to conclude at this juncture that the state proceeding was so lacking in notice and opportunity to be heard as to require that this court not give effect to the order of disbarment.

Mr. Klein's motion is denied. In deciding to give effect to the state court proceedings this court is not endorsing the procedures employed by the state courts. All this court decides today is that the state proceedings were not so offensive to due process as to require this court to treat the state disbarment as a nullity.

David N. Edelstein
Chief Judge

Dated: New York, N.Y.
Feb. 2, 1976

APPENDIX C

FOOTNOTES

Rule 5 (d) provides:

(d) Any member of the bar of this court who shall be disciplined by a court in any State, Territory, other District, Commonwealth or Possession, shall be disciplined to the same extent by this court unless an examination of the record resulting in such discipline discloses (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of..(2).. infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion on that subject; or (3) that the imposition of the same discipline by this court would result in grave injustice; or (4) that the misconduct established has been held by this court to warrant substantially different discipline.

Upon the presentation to the court of a certified or exemplified copy of the order imposing such discipline, the respondent attorney so disciplined shall, by order of the court, be disciplined to the same extent by this court, provided, however, that within 30 days of the service upon the respondent attorney of the order of this court disciplining him, either the respondent attorney

or a bar association designated by the chief judge in the order imposing discipline may apply to the chief judge for an order to show cause why the discipline imposed in this court should not be modified on the basis of one or more of the grounds set forth in this paragraph (d)....

Rules of the United States Courts for the Southern and Eastern Districts, New York, General Rule 5 (d).

2/ Id.

3/ Id; Selling v. Radford, 243 U.S.46 (1917); Theard v. United States, 354 U.S. 278 (1957).

4/ Mr. Klein accepted an invitation of the court to appear and address the grounds supporting his motion in open court.

5/ The petition alleges:

(a) Respondent's contumacious refusals to answer questions as a witness on January 23, 1964 and on January 24, 1964 at the Additional Special Term of the Supreme Court, Kings County, violated his inherent duty and obligation as a member of the legal profession and his duty to be candid and frank with the Court; and defied and flouted the authority of the Court to inquire into and elicit information within respondent's knowledge relating to respondent's charges and the charges of his clients Ursini of alleged misconduct and corruption upon the part of members of the Judiciary and members of the Bar, and relating to his conduct and practices as a lawyer. By his contumacious refusals to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry directed by this Court into the charges made by respondent and his clients as aforesaid.

(b) That in addition to and wholly apart from respondent's contumacious refusals to testify, respondent wilfully and contumaciously obstructed and impeded the Additional Special Term, by his wilful failure to appear on November 21, 1963 as a witness under subpoena pursuant to the direction of the Justice presiding at such Additional Special Term, and by instructing his client, John R. Ursini, to refuse to testify as a witness when said John R. Ursini appeared before the Additional Special Term as a witness pursuant to subpoena.

(c) In an action the Supreme Court, County of Queens, respondent deceived the Court and Lloyd's London, a third-party defendant therein, by preparing and serving a third-party summons and complaint in the name of William Weintraub, as attorney of record for the third-party plaintiff, when in fact William Weintraub had not been retained by third-party plaintiff to prosecute its action and the use of his name as such attorney was without the knowledge or consent of the said William Weintraub.

(e) Respondent in or about October, 1960, solicited legal business for Robert S. Long, an attorney, and attempted to induce Seville Iron Works, Inc., a corporation, to retain Robert S. Long as their attorney, in the prosecution of an action.

(f) Respondent in or about October, 1961, when appearing for a party in pending litigation communicated upon the subject of the pending controversy with an adverse party to the litigation then represented by counsel without the knowledge or consent of the attorneys for said adverse party.

(g) Prior to March, 1964, respondent had been retained as attorney for Fun Fair Park, Inc., In the period between March 8

and March 18, 1964, respondent aided in the preparation and filing of a petition by creditors in an involunatry bankruptcy proceeding in the District Court of the United States, Eastern District of New York, entitled "In the Matter of Fun Fair Park, Inc., Alleged Bankrupt," and further aided the petitioning creditors in the prosecution of the bankruptcy proceeding by rendering to them legal advice, and by preparing and delivering to such creditors legal papers which were executed and filed by them with the Clerk of said District Court. Following the aforesaid conduct by respondent, he thereafter appeared as attorney for the alleged bankrupt, and filed an answer to the petition of the creditors, denying certain allegations thereof based upon information furnished by him.

6/ 23 A.D. 2d 356, 262 N.Y.S.2d 416 (1965).

7/ Id. at 360, 262 N.Y.S. at 420.

8/ In the matter of William Robert Klein, Order of Disbarment (June 29, 1965) at 2 (emphasis added).

9/ Affidavit of William Robert Klein 19 at 5 (July 30,1965).

10/ 24 A.D. 2d 726 (1965), appeal dismissed, 17 N.Y. 2d 729, 216 N.E.2d 840, 269 N.Y.S. 2d 978 (1966).

11/ 18 N.Y. 2d 598, 219 N.E.2d 194,272 N.Y. S. 2d 372 (1966), motion for reagrument denied, 25 N.Y. 2d 735 (1969), motion to amend remittitur granted, 26 N.Y. 2d 961, 259 N.E. 2d 476, 311 N.Y.S. 2d 4 (1970).

12/ Id. at 600, 219 N.E. 2d at 194, 272 N.Y.S. 2d at 373.

13/ Id at 600-01, 219 N.E. 2d at 194-95, 272 N.Y.S. 2d at 373.

14/ 385 U.S. 973 (1966), petition for rehearing denied, 385 U.S. 1032, motion for leave to file second petition for rehearing denied, 388 U.S. 925 (1967).

15/ Tr. of October 17, 1966 at 99-100.

16/ The referee found the evidence supported part of charge (a) and charges (c), (f), and (g).

17/ Mr. Klein also claims that (1) the judgment of disbarment is defective in form; (2) that a report filed in the United States District Court for the Eastern District of New York by the United States Attorney resulted in the dismissal of an action seeking his federal disbarment on the basis of his state disbarment; and (3) that when the underlying charges were reduced from 8 to 3 1/2, the order was never reversed and the discipline never reconsidered.

Mr. Klein's first additional claim is apparently without merit and is in any event not an appropriate ground under Rule 5 (d). His second claim is both inappropriate under 5 (d) and misleading. The proceeding for federal disbarment was dismissed by Judge Dooling without prejudice after the United States Attorney withdrew from the case. Judge Dooling's opinion of June 25, 1969 stated that the "prima facie validity of the state disbarment and the utter and manifest unsoundness of the .... due process and other procedural contentions would make any other course incompatible with the interests of justice." In the Matter of the Application to Discipline William Robert Klein, 65 M 811. Mr. Klein's remaining claim is neither appropriate nor persuasive. He argues that the practice in New York when less than all of the underlying charges of a disbarment order are found by the Court of Appeals to be unsustainable is to reverse the judgment and remand the case to the Appellate Division for a reconsideration of appropriate discipline. When the Appellate Division confirmed the referee's report and dismissed several of the charges contained in the petition Mr. Klein was entitled, he argues, at that point to a reconsideration of the appropriate discipline.

Because the case was before the Appellate Division upon the motion to confirm remand was neither possible nor necessary. Regarding whether or not that court reconsidered its earlier determination upon the motion to confirm since it dismissed several charges of the original petition. Mr. Klein's motion to vacate, this court can confidently assume that the Appellate Division did consider whether to modify Mr. Klein's discipline and determined that disbarment was appropriate.

18/ In re Ruffalo, 390 U.S. 544 (1968). See also N.Y. Jud. Law 90 6 (McKinney 1968).

19/ It would appear that Mr. Klein did have an opportunity to be heard as to the charges stated in the petition but that his failure to deny any of the allegations constituted an admission of their truth under state law. See e.g., In re Severino, 28 A.D. 2d 547, 280 N.Y.S. 2d 221 (1967). In any event, all of the charges were contestable in the hearings before the referee.

20/ Selling v. Radford, 243 U.S. 46 (1917). See also N.Y. Jud. Law 90, 6 (McKinney 1968).

21/ Mr. Klein's only claim of prejudice is that the order of disbarment cast a cloud upon his credibility in the hearings before the referee. This court has no basis for concluding that the referee, an experienced member of the Bench, would have treated the evidence presented to him differently than he would have had the reference been made after a vacation of the order.

Filed
MEMO ENDORSEMENT Mar. 19,1976

In the matter of William Robert Klein:

On February 2,1976, Mr. William R. Klein's motion for vacature of his Federal disbarment was denied.
By motion dated February 20, and 26th 1976,

Mr. Klein has moved this court for a "sworn oral hearing with respect to the available evidence on hand" to establish certain claims under General Rule 5 (d) of the rules of this court. By letter dated March 5, 1976, Mr. Klein supplemented that application by calling to the court's attention certain decisions of the United States Supreme Court.

Although Mr. Klein denies that his application is for reargument, Affidavit of February 20, 1976 at 6, since Mr. Klein has not matter pending before this court to which his application for a hearing can be related, the court will construe his submissions as a motion for reargument of the opinion of February 2. The court does not envision any other manner of considering these submissions which would result in a different outcome.

The court has considered Mr. Klein's contentions even though as a motion for reargument his application is untimely. General Rule 9 (m). His motion seeks a hearing for the giving of testimony regarding (1) grounds under Rule 5 (d) not previously raised; (2) particular matters allegedly omitted or misrepresented in the court's opinion; and (3) the retaliatory nature of the state proceedings within the context of the Rule 5 (d) ground previously raised.

Apart from his frivolous assertion that this court's opinion was "invitatory" of further argument, Mr. Klein does not provide the court with a justification for waiting until this time to assert the grounds not previously raised. Nor does he indicate to which facts he would testify if given the opportunity to do so. The various particular matters which Mr. Klein asserts were either omitted from or improperly represented in the court's opinion and to which he would at this late date offer testimony are immaterial, clearly contradicted by the state record, or questions of law to which the presentation of testimony would be purposeless. Finally, Mr. Klein's assertions that the state proceedings were retaliatory and that he should be allowed to so testify are, like his prior assertions, mere conclusory allegations without support in the record and insufficient to support a judicial finding or to warrant a further hearing. Layman v. Tollett, 357 F. Supp. 910, 916 (E.D. Tenn. 1972), aff'd, 473 2d 912 (6th Cir. 1973).

The judicial decisions to which Mr. Klein refers the court's attention do not preclude the rationale of the February 2 opinion. In fact, Armstrong v. Manzo, 380 U.S. 545 (1965), by inquiring into the actual impact of the timing of the hearing and not resting upon the timing of the hearing alone, supports that rationale. See also Huntley v. North Carolina State Board of Education, 493 F. 2d 1016 (4th Cir. 1974) (applying the Armstrong analysis). Unlike the Armstrong case, in which the burden of proof of a fact material to the order was shifted to the petitioner which would not have been upon him had he received timely notice and hearing, there is in the instant case no suggestion or basis in

the state record for the court concluding that at the hearing before the referee the burden of proof of facts had been shifted to Mr. Klein. That in both Armstrong and the case at hand the petitioner was required to move to vacate the prior order does not mean that in both cases the burden of proof of facts material to the order had been shifted.

In sum, upon reargument of Mr. Klein's motion to vacate his order of federal disbarment, the court is not persauded to alter its prior disposition and reaffirms its denial of that motion.

So Ordered.

David N. Edelstein
Chief Judge

Date:
New York, New York
March 19, 1976
"Index #9

U.S.District Court
filed
March 19, 1976

STATE OF NEW YORK

in Court of Appeals

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of April A.D.1970.

PRESENT, Hon. Stanley H. Fuld,
Chief Judge, presiding

Mo. No. 266
In the matter of William Robert Klein, an Attorney,
Solomon A. Klein,
Respondent,
William Robert Klein,
Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein-from an order of the Appellate Division dated June 29, 1965-there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that he was denied due process and equal protection of the laws in that he was not informed of the charges against him and was deprived of an opportunity to be heard. The Court of Appeals considered these questions and found them to be without merit. (See 17 N.Y. 2d 729; 18 N.Y. 2d 598.)

AND the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

/s/ Gearon Kimball
Deputy Clerk

Postscript :

ORIGINAL

ORDER OF DISBARMENT of JUNE 29,1965
entered in Appellate Division,
Supreme Court of State of N.Y.
appears in Appellee's Appendix (AA)
in U.S.Court of Appeals

and the Opinion of the Court filed
therwith of same date

appear at AA 345 and 348 ;
in Appendix B of Petnr's
Petition 385 US 973

No. 76-1456

In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM ROBERT KLEIN, PETITIONER

v.

DAVID N. EDELSTEIN, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1456

WILLIAM ROBERT KLEIN, PETITIONER

v.

DAVID N. EDELSTEIN, CHIEF JUDGE,
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the judgment of the court of appeals affirming his disbarment by the district court.

1. On December 16, 1964, state disciplinary proceedings, charging seven acts of misconduct (see Pet. App. C, pp. 38-40), were commenced against petitioner. Petitioner challenged the lawfulness of those proceedings in several respects but did not deny the charges (*id.* at 32-33). On June 29, 1965, petitioner was disbarred by order of the Appellate Division of the New York Supreme Court. The opinion of the court indicated that its order may have rested not only on petitioner's failure to controvert the charges, but also in part on consideration of certain misconduct not previously charged against petitioner.

Petitioner's motion to vacate on grounds of lack of notice was granted to the extent of allowing him to serve an amended answer to the charges and referring the matter to a referee for further hearing (*id.* at 33-34). *Matter of Klein*, 24 App. Div. 2d 726.

Before any hearing was held, petitioner appealed the order of disbarment (which had not been vacated) to the New York Court of Appeals. Disregarding the portion of the Appellate Division's opinion indicating consideration of charges of which petitioner had had no notice, the court of appeals affirmed, stating that petitioner had received an opportunity to be heard but had raised no triable issues (Pet. App. C, p. 34). *Matter of Klein*, 18 N.Y. 2d 598, 272 N.Y.S. 2d 372, 219 N.E. 2d 194. This Court denied certiorari *sub nom. Klein* v. *Klein*, 385 U.S. 973, rehearing denied, 385 U.S. 1032, motion to file a second petition for rehearing denied, 388 U.S. 925.

Hearings were conducted before a referee pursuant to the Appellate Division's earlier order. Petitioner challenged the referee's qualifications and declined to attend. The referee heard evidence *ex parte* and found that three and one-half of the charges against petitioner were supported. The Appellate Division confirmed his report and denied petitioner's motion to vacate the order of disbarment (Pet. App. C, p. 35). *Matter of Klein*, 28 App. Div. 2d 538, 279 N.Y.S. 2d 579.

On the basis of the state court order, the United States District Court for the Southern District of New York thereupon entered its own order of disbarment against petitioner (Pet. App. C, p. 31a). Petitioner was notified and given opportunity to object. Following a hearing, the district court overruled petitioner's objections and declined to vacate the order (*id.* at 32). The court of appeals summarily

affirmed (Pet. App. B, p. 30), and denied petitioner's request for rehearing or rehearing *en banc* (*id.* at 31).

2. Contrary to petitioner's claims, neither the proceedings leading to his disbarment by the state court, nor the procedures followed here by the district court, were constitutionally infirm. Petitioner had full opportunity to deny the charges against him in the state court proceedings, but he declined to do so, relying instead on various legal objections that the Appellate Division overruled (see Pet. App. C, pp. 32-33). Even assuming that that court's decision was in fact tainted by partial reliance on charges of which petitioner had no notice, that aspect of its decision was disregarded by the New York Court of Appeals in affirming the order of disbarment (see page 2, *supra*). Moreover, petitioner was thereafter afforded a new opportunity to contest the charges against him, but again declined to do so when his challenge to the qualifications of the referee was overruled. In these circumstances, petitioner cannot complain of any lack of due process in the state court proceedings.

Nor did the proceedings before the district court deny petitioner due process. Rule 5(d) of the Rules of the District Court for the Southern District of New York[1]

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[1]Rule 5 of the United States District Court for the Southern District of New York provides in pertinent part:

> (d) Any member of the bar of this court who shall be disciplined by a court in any State, Territory, other District, Commonwealth or Possession, shall be disciplined to the same extent by this court unless an examination of the record resulting in such discipline discloses (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not consistently with its duty accept as final the conclusion on that subject; or (3) that the imposition of the same discipline

conforms in every respect to the principles this Court established in *Selling* v. *Radford*, 243 U.S. 46. Petitioner had full notice of the substantive charges upon which his earlier state court disbarment was based,[2] and it was his burden to demonstrate that that disbarment furnished an inadequate basis for disbarment in the federal court. See 243 U.S. at 51-52. As the district court correctly ruled, petitioner failed to discharge that burden and his disbarment from the federal court was accordingly proper.[3]

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by this court would result in grave injustice; or (4) that the misconduct established has been held by this court to warrant substantially different discipline.

Upon the presentation to the court of a certified or exemplified copy of the order imposing such discipline, the respondent attorney so disciplined shall, by order of the court, be disciplined to the same extent by this court, provided, however, that within 30 days of the service upon the respondent attorney of the order of this court disciplining him, either the respondent attorney or a bar association designated by the chief judge in the order imposing discipline may apply to the chief judge for an order to show cause why the discipline imposed in this court should not be modified on the basis of one or more of the grounds set forth in this Paragraph (d).

[2]Thus *Fuentes* v. *Shevin*, 407 U.S. 67, upon which petitioner relies (Pet. 15-16), is distinguishable.

[3]Petitioner inaccurately states (Pet. 14) that the District Court for the Eastern District of New York agrees with him that the state court disbarment proceeding was subject to "constitutional infirmities." Disbarment proceedings against petitioner were commenced in the Eastern District, but were then suspended when the United States Attorney declined the court's invitation to act as the prosecuting party. In dismissing the proceedings without prejudice, the district court referred to "[t]he *prima facie* validity of the state disbarment, and the utter and manifest unsoundness of the [petitioner's] due process and other procedural contentions * * *" (*In the Matter of the Application to Discipline William Robert Klein*, E.D. N.Y., No. 65-M-811, decided June 25, 1969).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1456

WILLIAM ROBERT KLEIN,

Petitioner,

vs.

DAVID N. EDELSTEIN, Chief Judge United States District Court for the Southern District of New York,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply of Petitioner to Opposition Memorandum of Solicitor General.

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REPLY OF PETITIONER
to OPPOSITIOM MEMO-
RANDUM OF SOLICITOR -
GENERAL

Respondent's Memorandum is regrettably regressive. It recedes from acknowledgments already gained by Petitioner, in advancement of his cause, for vacature of the ex-parte order of disbarment by the Chief Judge-respondent, that the underlying state court order of disbarment dated June 29,1965, was subject to constitutional infirmity on said date of issue.

Those acknowledgments appear in the record, from the Chief Judge's own opinion, unanimously affirmed by the three Circuit Court Judges, the Brief of the

Solicitor-General's subordinate Assistant United States Attorney for the Southern District of New York,and the Chief Judge's Report,filed with his Office dated September 9,1968, by the United States Attorney for the Eastern District of New York, Hon.Joseph P.Hoey,and his subscribed Chief Asst.Hon. Joseph V.Mc Carthy, also thereon.

That Report,filed in the Court(65 M 811) followed a three-year study of the State Court records and proceedings,both Appellate Division and Court of Appeals,as recited in said Report, by said U.S.Attorney in the Eastern District,functioning as an avowed representative of the Department of Justice. His emphasis ,as appears in the record, was upon that "Justice " significance, in declining to prosecute upon the basis of a state judgment of such infirm character.

Petitioner submits that the Opposition Memorandum papers over the essentials of Petitioner's Brief, continuing certain myths,which were exposed by the Eastern District U.S.Attorney's Report to his Chief Judge, back in 1968.

For example, it is repeated by each adverse opinion,and position, that the Petitioner failed to deny the charges,and thus no triable issues were presented by the Petitioner in his first demurrer response of 11 objections of January 6,1965, to Prosecutor's Petition of December ,1964.

The U.S.Attorney showed that at least three triable issues were raised in Petitioner's Answer; that the right to make answer after denial of demurrer,survived;and that such judgment was incurable except by vacature, and could not serve as basis for Federal prosecution or removal or any further state proceedings.

Thus also,this Opposition Memorandum,brusquely dismisses the supreme authority of the the two Cases** of this Court(pp.15-19),which in 1968, had been anticipated by the Eastern District Court and Prosecutors, when on May 20,1969, the Court dismissed without prejudice its own Order to Show Cause ,and Petition of the U.S.Attorney,vacated its temporary suspension order,and restored Petitioner to membership in good standing in that Bar.

Thus also,this Opposition Memorandum ignored the fact that most of the charges and findings of guilt which "required" disbarment,according to the State Court's Opinion of June 29,1965, had already been dismissed on State Prosecutions and State Courts' own motions,and that thus,the said predicate judgment recited in the respondent Chief Judge's order of disbarment of September 25,1974 had been rendered obsolete in any event.

Again, also,the Memorandum recites at length the controlling Federal Court General Rule 5 d and passes over the fact that each of the prescriptions of procedure ,therein essentially defined as due process, for any discipline to follow,was violated by the respondent Chief Judge.

The author's cavalier treatment of the State Court of Appeals,in "disregarding" a constitutional fundamental of notice of charge(p.3),when affirming,includes the oversight by the author of the supreme force of the Gompers v.Busk Stove, 221 US 408,440, requiring the vacature of any judgment of punishment,based on a collective finding of guilt, when one finding and charge is later vacated.

** the Armstrong and Fuentes cases

It must also be noted in connection with the foregoing observations, that the Opinion of the Chief Judge (App.C,p.32,) took great pains to point out that the State Court,when issuing the judgment,on June 29,1965,(at p.33) had incorporated the opinion by reference bearing even date. (Appellee's App. AA 345, 348).

Respectfully submitted

William R.Klein , pro se
Petitioner.